BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

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| In the Matter of: | ) | |
| | ) | |
| Opinion requested by: | ) | No. 76-091 |
| Stephen Reinhardt, | ) | Sept. 7, 1977 |
| an attorney representing | ) | |
| Winner/Wagner & Associates | ) | |
| | ) | |

BY THE COMMISSION: We have been asked the following questions by Stephen Reinhardt, an attorney representing Winner/Wagner & Associates:

Winner/Wagner & Associates (hereinafter "Winner/Wagner") is a California corporation that provides a variety of services, including managing political campaigns, public relations and governmental relations. Ethan Wagner, one the principal owners and an employee of the firm, is registered as a lobbyist pursuant to the provisions of the Political Reform Act. Christina Rose and Bob Garcia, who are employees of the firm, also are registered lobbyists. No other employee of the firm, including the other principal owner, Charles Winner, attempts to influence legislative or administrative action within the meaning of the Act. In the past, these other employees have managed or served as consultants to political campaigns involving ballot measures and candidates for local and federal offices. They have not, however, provided consulting or management services in connection with a campaign for state office.

The firm has been asked by a candidate for elective state office to manage his campaign. In light of the composition of the firm and the nature of the services it provides, its attorney has asked the following questions:

(1) Does the Political Reform Act prohibit employment of the firm as the manager of or consultant to a campaign for elective state office?

(2) If the Act does not absolutely prohibit the firm from providing management or consultant services

to a campaign for elective state office, must the firm nevertheless receive full and adequate consideration for any services rendered?

(3) If the Act does not prohibit the firm from providing management or consultant services to a campaign for elective state office, are there any legal restrictions imposed upon Mr. Wagner other than the prohibitions contained in Government Code Section 86202?

(4) If the Act does prohibit the firm from providing management or consultant services to a campaign for elective state office, could the prohibition be avoided if the firm agreed not to participate in any of the fund raising activities of the campaign and, in particular, not to solicit, accept or arrange for any campaign contributions or to act as an agent or intermediary with respect to any such contributions?

(5) Would the answers to the foregoing questions be different if the candidate presently held an elective state office?

CONCLUSION

The Political Reform Act does not prohibit Winner/Wagner from being employed as the manager of or consultant to a campaign for elective state office, provided that the firm and its employees adhere to certain conditions. First, the firm must receive full and adequate consideration for any services it renders to the campaign. Second, the firm, acting through its employees, must not engage in any activities which would violate the prohibitions contained in Government Code Sections 86202, 86203 and 86205. This conclusion is applicable regardless of whether the candidate involved presently holds an elective state office.

ANALYSIS

The Political Reform Act makes it unlawful for a lobbyist to make a contribution to a candidate for elective state office, to act as an agent or intermediary in the making of any such contribution, or to arrange for the making of such a contribution by himself or by any other person. Government Code Section 86202.[1/] The Act also makes it unlawful

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1/ All statutory references are to the Government Code unless otherwise noted.

for a lobbyist to make, arrange, or act as an agent or intermediary in the making of a gift, or gifts, aggregating more than $10.00 in value in a calendar month to a candidate for elective state office. Section 86203. Finally, the Act prohibits a lobbyist from doing anything "with the purpose of placing [a candidate for elective state office] under personal obligation to him or to his employer." Section 86205(a).[2/]

Pursuant to our authority to adopt rules and regulations "to carry out the purposes and provisions" of the Political Reform Act, Section 83112, we adopted a regulation to insure the effectiveness of the foregoing prohibitions. It provides, in pertinent part, that:

> If a lobbyist is a partner ..., a shareholder in a professional corporation, or holds ten percent (10%) or more of the common stock of a corporation, or is an employee of any entity which is an employer of lobbyists pursuant to Paragraph (b) of this regulation, the prohibitions set forth in Government Code Sections 86202, 86203 and 86205 are applicable with respect to the assets of the firm or corporation.
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> 2 Cal. Adm. Code Section 18619(f).

Paragraph (b) of 2 Cal. Adm. Code Section 18619, referred to in the foregoing quote, provides that a firm, corporation or other business entity which is retained for the purpose of attempting to influence legislative or administrative action is an employer of a lobbyist if any of its members, partners, employees or agents qualify as lobbyists. 2 Cal. Adm. Code Section 18619(b).

Because one of the principal shareholders in Winner/Wagner is a lobbyist and because the firm employs lobbyists, the prohibitions established by Sections 86202, 86203 and 86205 are applicable to Winner/Wagner's assets.[3/] The question before us, therefore, is whether these prohibitions on the

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[2/] Section 86205 also imposes certain other restrictions on lobbyists, but they are not directly relevant to the issues posed by this opinion request. See Section 86205(b) through (f).

[3/] The fact that two employees of the firm, Christina Rose and Bob Garcia, are registered lobbyists would serve to activate the restrictions imposed by 2 Cal. Adm. Code Section 18619(f) regardless of whether Mr. Wagner qualified as a lobbyist.

use of the firm's assets preclude or place conditions on employment of the firm as the manager of or consultant to a campaign for elective state office. We believe that the Act does not absolutely preclude such an arrangement so long as the firm receives full and adequate consideration for any services it renders to a campaign.

If Winner/Wagner failed to receive full and adequate consideration, it would be making an unlawful contribution or gift of its assets, in violation of 2 Cal. Adm. Code Section 18619(f). This is because the Act defines the term contribution, in pertinent part, as "a payment ... except to the extent that full and adequate consideration is received...." Section 82015. Similarly, the term gift is defined, in pertinent part, to mean "any payment to the extent that consideration of equal or greater value is not received." Section 82028.[4/] "Payment" is defined to include any rendering of "services or anything else of value, whether tangible or intangible" (Section 82044) and thus would include the type of services which Winner/Wagner typically provides.

A question may arise concerning the relationship between this full and adequate consideration requirement and the "volunteer personal services" exception to the definition of the term contribution. Section 82015.[5/] The issue would be under what circumstances an employee of Winner/Wagner could provide volunteer personal services to a campaign with which the firm had a contract. Although it might be difficult

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[4/] Although the phrases "full and adequate consideration" and "consideration of equal or greater value," as used in Sections 82015 and 82028, respectively, may not mean precisely the same thing, we think that receipt of full and adequate consideration by Winner/Wagner necessarily means the firm has not made a gift of its assets within the meaning of Section 82028. Moreover, because the services rendered to the campaign are political in nature, the "payment" involved, if it is anything, would be a contribution and not a gift. See Opinions requested by Assemblyman Willie Brown, 1 FPPC Opinions 67 (No. 75-055, July 2, 1975), and Mayor Janet Gray Hayes, 1 FPPC Opinions 210 (No. 75-145, Dec. 4, 1975). See also Section 82030(b)(1). Accordingly, the prohibition against gifts from the firm's assets contained in Section 86203 and 2 Cal. Adm. Code Section 18619(f) is not really implicated in this opinion.

[5/] Section 82015 provides, in pertinent part: "Notwithstanding the foregoing definition of 'contribution,' the term does not include volunteer personal services...."

to determine when an employee of Winner/Wagner is acting as a true volunteer and when he is acting within the scope of his employment, facts are not before us that would require us to address that issue in this opinion. Nevertheless, we note that the fact that an employee rendered a service to the campaign during other than normal workday hours would not be conclusive evidence that the service was volunteer. Campaign management is not a 9:00 a.m. to 5:00 p.m. job. It generally entails working evenings and weekends, and we think it is obvious that services rendered at these times, as well as those provided during the normal workday, could be within the scope of a campaign management contract. Only when a firm can demonstrate clearly that an employee is engaged in non-compensated activity which is beyond the scope of his employment would it be permissible for the firm to rely on the voluntary services exception to the definition of the term "contribution" and not receive compensation for a service rendered to the campaign by one of its employees.

If the firm does receive full and adequate consideration for the services it renders to the campaign, we think this also suggests that the firm will not be using its assets for "the purpose" of placing the state candidate under personal obligation to it or to any of its members within the meaning of Section 86205(a). Section 86205(a) is one of a series of proscriptions imposed on lobbyists by Section 86205 and its scope can best be determined by viewing it in the context of the other proscriptions. The other prohibitions include: deceiving or attempting to deceive a government official about facts pertinent to pending or proposed legislative or administrative action (Section 86205(b)); causing or influencing the introduction of legislation for the purpose of thereafter being employed to secure its passage (Section 86205(c)); attempting to create a fictitious appearance of public favor or disfavor with respect to any legislative or administrative action (Section 86205(d)); representing falsely that the lobbyist can control the official actions of a government official (Section 86205(e)); and accepting or agreeing to accept any payment contingent upon the outcome of any legislative or administrative action (Section 86205(f)).

The types of activities proscribed by Section 86205 in general suggest to us that an agreement by Winner/Wagner to provide management or consultant services to a campaign for elective state office in exchange for full and adequate consideration is not the type of arrangement at which the Section is directed. The arrangement does not involve an attempt by the firm or its employees to pervert the normal legislative or administrative processes by means of some

illegitimate activity. Thus, although we are not prepared to delineate in this opinion precisely what activities are encompassed by Section 86205(a), we conclude that the proposed course of conduct presently before us is not among them. We think that the essential "purpose" of the agreement to provide campaign assistance in exchange for full and adequate consideration is not to place the candidate under a personal obligation to the firm or its representatives in the sense intended by Section 86205(a), but rather to enable the firm to ply its trade and attempt to earn a profit.[6/]

Even if Winner/Wagner receives full and adequate consideration for any services it renders to a campaign, it must also honor a second condition. Its employees cannot engage in activities which would be contrary to the prohibitions imposed by Sections 86202, 86203 or 86205. In particular, this means that the firm's employees cannot, as part of their employment duties, act as agents or intermediaries in the making of contributions to the campaign and cannot arrange for the making of any contributions to the campaign. See Section 86202.[7/] To do so necessarily would violate the Act since it would involve the use of the firm's assets (for salary payments, support services, etc.) in contravention of the prohibitions established by 2 Cal. Adm. Code Section 18619(f).

Regulation 2 Cal. Adm. Code Section 18619 was adopted to clarify the status under the Political Reform Act of entities, such as Winner/Wagner, that are retained for the purpose of attempting to influence legislative or administrative action.[8/] The Act defines a lobbyist as any "person" who is employed for the purpose of influencing legislative or administrative

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[6/] If services were provided at a discount, on the other hand, questions could be raised about the firm's "purpose" for doing so and, hence, Section 86205(a) as well as Section 86202 might be implicated.

[7/] It also would be unlawful for the candidate or his campaign committee to accept any such contributions. Section 86204.

[8/] The deliberations which resulted in 2 Cal. Adm. Code Section 18619 can be found in the following transcripts of hearings of the Commission: February 21, 1975, at 131-167; March 20, 1975, at 61-84, 91-129; and April 3, 1975, 15 16-34.

action, Section 82039,[9/] and the definition of the term "person" includes firms, partnerships, companies and corporations. Section 82047. Accordingly, prior to the adoption of 2 Cal. Adm. Code Section 18619, business entities, as well as natural persons, could have been lobbyists within the meaning of the Act.

We decided, however, that such an interpretation would not be the best means of implementing the provisions of the Act since it would necessitate a great deal of duplicative reporting by a firm and the employees of the firm who individually qualified as lobbyists. Accordingly, we promulgated 2 Cal. Adm. Code Section 18619(b), which provides that a firm which is retained to influence legislative or administrative action is an employer of lobbyists within the meaning of Section 86108(a) if any of its members, partners or employees qualify as lobbyists, but is not itself a lobbyist.

However, it was apparent to us that this interpretation would create some obvious loopholes if it were not accompanied by a rule which applied the prohibitions of Sections 86202, 86203 and 86205 to such a firm. For example, in the absence of such a rule, a lobbyist could avoid the prohibition against making contributions by establishing a separate entity, such as a corporation, and then using the entity's assets to make a contribution. To avoid this problem we adopted 2 Cal. Adm. Code Section 18619(f).

We also think that 2 Cal. Adm. Code Section 18619(f) addresses a more subtle problem which is relevant to the facts before us in this case. Even if a firm in which a lobbyist is a partner or significant shareholder is not a sham formed solely to avoid the Act's prohibitions, and Winner/Wagner clearly falls into this category, the lobbyist nevertheless may profit from the firm's involvement in the fundraising aspects of a campaign in ways the Act was designed to curtail. This can occur because the successful candidate who benefited

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[9/] The full definition of the term is:

> "Lobbyist" means any person who is employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or through his agents with any elective state official, agency official or legislative official for the purpose of influencing legislative or administrative action, if a substantial or regular portion of the activities for which he receives consideration is for the purpose of influencing legislative or administrative action. No person is a lobbyist by reason of activities described in Section 86300.

Section 82039.

from contributions arranged by the firm's employees may be inclined to be more receptive to the firm's lobbyists when they approach him in his capacity as a legislator.

We recognize that to some extent the potential for more favorable treatment of the firm's lobbyists by a successful candidate also is created merely by the fact that the firm can manage his campaign. However, the Political Reform Act does not attempt to address every means by which a lobbyist can garner influence with an elected state official. Lobbyists can endorse candidates for elected state office and can urge others to support or endorse candidates. Opinion requested by Janet Adams, 2 FPPC Opinions 127 (No. 75-173, Aug. 3, 1976). They also can perform volunteer services such as walking precincts, attending meetings or making speeches. Opinion requested by Elliott J. Dixon, 2 FPPC Opinions 70 (No. 75-187, June 1, 1976).

One subject the Act is concerned with, however, is limiting the influence that lobbyists can generate by their involvement in making contributions, acting as an agent or intermediary for contributions or arranging for contributions. In promulgating 2 Cal. Adm. Code Section 18619(f), we were cognizant of the fact that this type of influence can result not only from the lobbyist's direct involvement in the activities proscribed by Section 86202, but also from the involvement of those associated with the lobbyist in a firm in which he is a principal. Accordingly, 2 Cal. Adm. Code Section 18619(f) imposes all of the proscriptions of Sections 86202, 86203 and 86205 on a firm such as Winner/Wagner and limits the range of services the firm can provide while managing a campaign for elective state office.

Regulation 18619(f) imposes restrictions only on the use of the firm's assets and, therefore, does not specifically proscribe what the firm's non-lobbyist employees can do while acting as volunteers. Nevertheless, as we have indicated, the ability of the firm's non-lobbyist employees to provide genuine volunteer services to a candidate with whom the firm has a management contract may be restricted. See text, supra at 4-5. Most services rendered by employees of the firm to such a candidate, regardless of the time when they are performed, necessarily will be within the scope of the campaign management contract and, hence, within the scope of the employees' terms of employment. They therefore would not be "voluntary" within the meaning of the Act.

Of course, the firm's lobbyist employees are prohibited from engaging in any of the activities proscribed by Sections 86202, 86203 and 86205 regardless of whether they are acting as volunteers or as employees of the firm. The Act's prohibitions, as applied to lobbyists, are complete and proscribe the included activities under all circumstances.

Thus, we conclude that the firm of Winner/Wagner is not prohibited from being employed as the manager of or consultant to a campaign for elective state office so long as it receives full and adequate consideration for the services it renders and its employees, while acting in their capacity as employees, refrain from engaging in any acts prohibited by Sections 86202, 86203 and 86205. We also conclude that this interpretation is the same regardless of whether the candidate in question is presently an elected state officer. The prohibitions contained in Sections 86202, 86203 and 86205 apply to both state candidates and elected state officers and, hence, our reasoning and conclusions herein are not affected by the fact that the candidate may presently hold office.

Approved by the Commission on September 7, 1977. Concurring: Lapan, Lowenstein, McAndrews and Quinn. Commissioner Remcho was absent.

Daniel H. Lowenstein
Chairman